South Carolina Law Review

Volume 41
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 19

Fall 1989

Workers' Compensation Law

WORKERS' COMPENSATION LAW

I. COURT PERMITS STATUTORY EMPLOYEES TO BE COUNTED FOR JURISDICTIONAL PURPOSES IN WORKERS' COMPENSATION CASES

In *Ost v. Integrated Products, Inc.*[1] the South Carolina Supreme Court enlarged the jurisdiction of the Workers' Compensation Commission, particularly with regard to small businesses.

Ost was a pilot employed by Integrated Products, Inc. (Integrated), a Georgia corporation engaged in the manufacture of yarn.[2] Integrated conducted business in South Carolina through three employees who regularly traveled to South Carolina in the course of their employment. A second Georgia corporation, National Sales Company, Inc. (National), a sister company to Integrated, provided a three-person sales force to sell Integrated's yarn in South Carolina. National made frequent use of Integrated's plane and pilot[3] and had an employee, Nolan, aboard the airplane when it crashed in Greenville County on January 17, 1984. Both Nolan and Ost, the pilot, died as a result of the crash.[4]

On appeal from a circuit court order affirming the Commission's award of death benefits, the supreme court considered the following two issues: (1) whether the National salesmen were statutory employees of Integrated; and (2) whether statutory employees may be included to meet the jurisdictional requirement that before an employer may be subject to the Workers' Compensation Act,[5] the employer must have no less than four employees regularly employed in the state.[6]

Integrated sought to prevent an inquiry into the application of the statutory employees section. It argued that because it employed less than four employees in South Carolina, it was presumptively exempt from the Workers' Compensation Act under *Nolan v. National Sales Co.*[7] The court rejected Integrated's argument because in *Nolan* the

---

1. 296 S.C. 241, 371 S.E.2d 796 (1988).

2. Record at 32-33.

3. *Ost*, 296 S.C. at 247, 371 S.E.2d at 799. National had an informal lease arrangement with Integrated, characterized as "a handshake between the two companies," for the use of the plane. Record at 99.

4. *Ost*, 296 S.C. at 243, 371 S.E.2d at 797.

5. S.C. CODE ANN. §§ 42-1-10 to -19-50 (Law. Co-op 1976 & Supp. 1988).

6. *Id.* § 42-1-360(2) (Law. Co-op. 1976).

7. 292 S.C. 1, 354 S.E.2d 575 (Ct. App. 1987), *aff'd*, 294 S.C. 371, 364 S.E.2d 752 (1988). This case resulted from the same plane crash when Nolan's survivors brought

plaintiffs tried to amalgamate the employees of Integrated, the contractor, in order to meet the number of subcontractor employees necessary for jurisdiction. Conversely, in *Ost* the plaintiffs sought to include employees of the subcontractor to increase the number of employees attributable to the contractor.[8]

Once past the presumptive exemption holding of *Nolan*, the court applied the familiar test from *Marchbanks v. Duke Power Co.*[9] and its progeny to determine whether the National salesmen could be considered statutory employees of Integrated, the primary employer. Although it indicated that no hard and fast rule could be formulated and that each case must be evaluated on its own facts,[10] the court sought to determine whether the employees of National were engaged in an activity that was a necessary and essential part of the trade or business of Integrated.[11] The court readily found sales to be an important part of the business of a yarn manufacturer and concluded that the National salesmen were statutory employees.[12]

The court then turned to the second, and perhaps more important, issue of the case: whether statutory employees may be "stacked" to reach the four employee jurisdictional requirement of South Carolina Code section 42-1-360(2).[13] The court began its analysis by stating the general purpose of the statutory employee provision of the Workers' Compensation Act:

> "It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was part of his trade or business by permitting such owner to sublet or subcontract some part of said work. Doubtless in many instances such contractor would be financially irresponsible, or the number of employees under him would be so small, . . . that such contractor would not be required under the Act to carry compensation insurance. It was therefore, provided under the first paragraph that where such work in which the employee was engaged was a part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees on an independent contractor or not."[14]

---

suit against National.

8. *Ost*, 296 S.C. at 243-44, 371 S.E.2d at 798.

9. 190 S.C. 336, 2 S.E.2d 825 (1939).

10. *See Ost*, 296 S.C. at 244-46, 371 S.E.2d at 798-99 (noting the various tests from Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963); Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940); and *Marchbanks*, 190 S.C. 336, 2 S.E.2d 825).

11. *Id.* at 246, 371 S.E.2d at 799.

12. *Id.*

13. S.C. CODE ANN. § 42-1-360(2) (Law Co-op. 1976).

14. *Ost*, 296 S.C. at 247, 371 S.E.2d at 800 (quoting *Marchbanks*, 190 S.C. at 344, 2 S.E.2d at 828).

Most of the cases in which section 42-1-360(2) has been applied, however, have involved claimants who were themselves subcontractors. Thus, the statutory employee section seems most applicable to these claimants. In *Ost* the claimant was not a subcontractor, but a regular employee of the principal employer who sought to amalgamate nonemployees to avail himself of compensation benefits. Even though the *Marchbanks* rational quoted by the court in *Ost* seems sufficiently broad to address this situation, the facts of *Ost* are not typical of most statutory employee cases.[15]

The court concluded that the policy of resolving doubt in favor of coverage under the Workers' Compensation Act supported the inclusion of statutory employees of Integrated for purposes of jurisdiction.[16] A similar result reached by the Virginia Court of Appeals was persuasive.[17] That court reasoned that to disallow stacking would lead to evasion of compensation liability. It stated, " 'If a subcontractor's employees were not considered in determining the contractor's exemption under the Act, the work could simply be subdivided among different contracting entities to evade liability under the Act.' "[18]

The narrowing of the exemption provision of South Carolina Code section 42-1-360(2) is not surprising in light of the court's preference for coverage. Moreover, *Ost* could indicate the first step toward judicial agreement with states that have done away with jurisdictional minimums.[19] While the abolition of such a requirement would, of course, be the province of the General Assembly, the court's attitude toward the provision would be persuasive in the General Assembly's decision. The result in *Ost*, however, is unusual when compared with the contrary outcome of *Nolan*, since the respective claimants died in the same

---

15. *See, e.g.*, Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940) (painting contractor injured); Hairston v. Re: Leasing, Inc., 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985) (truck driver held statutory employee of contracting dealership).

16. *See Ost*, 296 S.C. at 248, 371 S.E.2d at 800.

17. Smith v. Weber, 3 Va. App. 379, 350 S.E.2d 213 (1986). After concluding the claimant and other subcontractors were statutory employees of the principal, the Virginia court stated, "Thus the subcontractor's employees are employees of the contractor for purposes of liability. Since they are the contractor's employees for purposes of determining liability, reason dictates that they should also be considered employees for determining applicability of the [Workers' Compensation] Act." *Id.* at ___, 350 S.E.2d at 214.

18. *Id.* at ___, 350 S.E.2d at 214, *quoted in Ost*, 296 S.C. at 248, 371 S.E.2d at 800.

19. Only twelve states have numerical minimum statutes. In all other jurisdictions employers are within the coverage of their respective workers' compensation acts if they have even one employee. 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 52.10 (1986). Professor Larson points out that only two states have held that statutory employees are not to be included in the minimum employee calculation. He notes that the contrary, more liberal view is more effective in carrying out the goals of statutory employee legislation. *Id.* § 52.32.

crash.[20] Still, the *Ost* holding furthers the goal of assuring compensation for injured employees as embodied in the Workers' Compensation Act.

Weyman C. Carter

II. MENTAL-MENTAL INJURIES HELD COMPENSABLE UNDER WORKERS' COMPENSATION ACT

In *Stokes v. First National Bank*[21] the South Carolina Court of Appeals extended the definition of a "compensable injury" to include nervous breakdowns and subsequent mental injuries resulting from mental and emotional stress associated with working conditions.[22] Prior to *Stokes*, workers' compensation benefits in South Carolina had been awarded for work-related emotional illnesses only when they resulted from physical injuries.[23] The *Stokes* court, however, refused to distinguish mental-mental injuries from physical-mental injuries.[24]

Daniel Stokes was a vice president of the First National Bank in Columbia, South Carolina. Stokes' work hours increased significantly during 1984 because of an anticipated merger with South Carolina National Bank. In January Stokes was working approximately forty-five hours per week. By November his workload had increased to between 112 and 126 hours per week. Testimony at trial showed that the merger generated too much work for the few people able to do it. Stokes was burdened with much of the extra work.[25]

The merger was completed as scheduled on December 1, 1984. Stokes worked until December 9, 1984, when he was hospitalized for a nervous breakdown. Stokes attempted to return to work in January

---

20. The claimant in *Nolan* argued that the employer and carrier should be estopped from denying coverage under the Act because of the existence of a multistate endorsement in the employer's policy. The court of appeals refused to adopt this position in the absence of a statutory estoppel rule. *See* Nolan v. National Sales Co., 292 S.C. 1, 4-5, 354 S.E.2d 575, 577 (Ct. App. 1987), *aff'd*, 294 S.C. 371, 364 S.E.2d 752 (1988). The result would be different today. The South Carolina General Assembly has amended the Workers' Compensation Act by adding section 45-5-80(c), which provides: "Any insurer who issues a policy of compensation insurance to an employer not subject to this title may not plead as a defense that the employer is not subject to this title and is estopped to deny coverage." S.C. CODE ANN. § 42-5-80(C) (Law. Co-op. Supp. 1988).

21. 298 S.C. 13, 377 S.E.2d 922 (Ct. App. 1988).

22. *Id.* at 14, 377 S.E.2d at 923.

23. *See* Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963).

24. *Stokes*, 299 S.C. at 22-23, 377 S.E.2d at 927. Mental-mental injuries are mental disorders resulting from mental stimuli. *Id.* at 14-15, 377 S.E.2d at 922-23. Physical-mental injuries are those resulting from physical stimuli. *See id.*

25. *See id.* at 15-16, 377 S.E.2d at 923.

1985, but he was fired. Subsequently, Stokes accepted employment paying $14,000 per year less than his position with First National Bank. Evidence indicated that Stokes was permanently disabled and unable to return to a position comparable to his previous job. The Workers' Compensation Commissioner found that Stokes suffered a fifty percent permanent partial disability from a bodily injury. The full Commission and the circuit court affirmed the order.[26]

On appeal the court's analysis began with the evolution of the term "accident" in workers' compensation law. "Accident," for compensation purposes, means an untoward, unexpected event causing injury.[27] The court stated that external force, violence or wounds are not essential, thus indicating that the unexpected resulting injury is itself compensable.[28] The court stated that "[t]he term accident relates not only to the dynamics of the occurrence causing the injury but also to the injury itself."[29] The court of appeals, for purposes of compensation, equated mental injury cases with heart attack cases.[30] In heart attack cases, South Carolina courts have affirmed compensation awards when the injury resulted from "unexpected strain or overexertion *or by unusual or extraordinary conditions of employment.*"[31]

In *Yates v. Life Insurance Co. of Georgia*[32] the South Carolina Court of Appeals denied compensation to a claimant who attempted suicide because of job related activities.[33] The court held the mental disorder was not compensable because it was the result of normal working conditions.[34] Under those circumstances, no "accident" occurred as defined by the law.[35]

Noting that a majority of jurisdictions compensate mental-mental injuries, the court concluded that mental-mental injuries would be compensable if the mental disorder was the result of unusual or extraordinary working conditions.[36] The Commission found Stokes' mental disorder to be the result of extraordinary working conditions.[37] Applying the new rule, the court found Stokes' injuries to be

---

26. *Id.* at 15, 377 S.E.2d at 923-24.

27. *Id.* at 17, 377 S.E.2d at 924.

28. *See id.* (citing Hiers v. Brunson Constr. Co., 221 S.C. 212, 70 S.E.2d 211 (1952)).

29. *Id.*

30. *Id.* at 18, 377 S.E.2d at 925.

31. *Id.* at 18-19, 377 S.E.2d at 925 (citing Kearse v. South Carolina Wildlife Resources Dep't, 236 S.C. 540, 546-47, 115 S.E.2d 183, 186-87 (1960)).

32. 291 S.C. 301, 353 S.E.2d 297 (Ct. App. 1987).

33. *See id.* at 306, 353 S.E.2d at 300.

34. *Id.*

35. *See id.*

36. *Stokes*, 298 S.C. at 21, 377 S.E.2d at 926.

37. *Id.*

compensable.[38]

The court found further support for its holding in the social policy behind workers' compensation. It stated that the Workers' Compensation Act was designed to protect employees from the hazards of employment, and that the Act is to be applied liberally, affording the claimant the greatest possible benefits.[39] The court determined that the purpose of the Act could not be fulfilled by allowing compensation for mental disorders caused by physical stress while disallowing compensation for those caused by mental stress.[40]

The court of appeals' analysis and holding are both logical and complete. Compensating a claimant for mental injuries resulting from extraordinary work-related stimuli is a logical progression from the compensation afforded claimants who suffer heart attacks resulting from the same unusual working stimuli.

The court's holding, however, raises a difficult question: When do circumstances become so unusual or extraordinary that compensation for injuries is appropriate? The line between slightly strenuous working conditions, and those that reach the level of "unusual" and "extraordinary," is not well defined. The court stated in *Stokes* that "[f]or a number of years unusual and excessively long work schedules have been recognized as unusual and extraordinary working conditions."[41] This statement contemplates a comparison between the claimant's normal hourly schedule and the hourly schedule immediately preceding the accident. Such a quantitative test, standing alone, could result in unjust and overly narrow decisions if courts are not careful to consider also the level of stress associated with the work.

In heart attack cases courts have factored in the qualitative aspects of the claimants' working conditions, such as stress, physical exertion and time pressures.[42] Unfortunately, although this type of analysis may result in more compassionate holdings, the vagueness of the test may lead to uncertainty and confusion.

If, however, courts were to require strictly that a claimant work a particular number of overtime hours before compensation could be given, employees mentally or emotionally injured by conditions not involving excessive hours would be unfairly excluded. Thus, the current rule, if unclear, at least is flexible. Commissioners can analyze each sit-

---

38. *See id.*

39. *Id.* at 21-22, 377 S.E.2d at 926-27 (citing Taylor v. Mount Vernon-Woodberry Mills, 211 S.C. 414, 45 S.E.2d 809 (1947); Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941)).

40. *Id.* at 22, 377 S.E.2d at 927.

41. *Id.* at 19, 377 S.E.2d at 925.

42. *See* McWhorter v. South Carolina Dep't of Ins., 252 S.C. 90, 165 S.E.2d 365 (1969); Brown v. La France Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985).

uation and determine if the work environment and conditions were sufficiently strenuous to support an award of compensation for a resulting mental injury.

The court of appeals' decision in *Stokes* is a sensible extension of existing South Carolina law. Allowing compensation for mental-mental injuries is a logical progression from compensating heart attack victims whose complications were caused by extraordinary conditions of employment. Clearly, the difficulty courts will face in future cases will concern determinations of what types of stressful working conditions are sufficiently "extraordinary" to merit compensation.

Sandra M. Harlen

III. Workers' Compensation Claim Barred by Employee's Election to Sue Third Party without Notice to Employer

The South Carolina Court of Appeals addressed the multifaceted purpose of workers' compensation law in *Hudson v. Townsend Saw Chain Co.*[43] The court held that an employee who pursued a third-party tort action without notifying either the Commission, her employer, or the employer's insurance carrier of the lawsuit had elected her remedy by operation of South Carolina Code section 42-1-560(b).[44] In barring the employee from making a workers' compensation claim, the court of appeals limited the judicial policy of construing workers' compensation law in favor of the worker and ruled as to when election of remedies would be applied. This question had earlier been left unanswered in *Johnson v. Pennsylvania Millers Mutual Insurance Co.*[45]

---

43. 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988).

44. S.C. Code Ann. § 42-1-560(b) (Law. Co-op. 1976). This section provides in relevant part:

> The injured employee . . . shall be entitled to receive the compensation and other benefits provided by this Title and to enforce by appropriate proceedings his . . . rights against the third party; [and] . . . the carrier shall have a lien on the proceeds of any recovery from the third party . . . . Notice of the commencement of the action shall be given within thirty days thereafter to the [Workers' Compensation] Commission, the employer and carrier upon a form prescribed by the [Workers' Compensation] Commission.

Id.

45. 292 S.C. 33, 40, 354 S.E.2d 791, 795 (Ct. App. 1987) (holding that sections 42-1-550 and 42-1-560 cannot bar relief under the doctrine of election of remedies "when an injured employee has given the carrier proper notice of the third-party action). Although the *Johnson* court indicated in dicta that settlement with a third party tortfeasor without consultation with the employer would have barred a subsequent workers' compensation claim, it did not address situations in which proper notice of the suit had not been given at all. *See id.* at 39, 354 S.E.2d at 794.

The *Hudson* court emphasized that workers' compensation law is intended to protect not only the employee, but also the employer and its insurance carrier.[46] The court stated that its holding was consistent with the supreme court's decision in *Fisher v. South Carolina Department of Mental Retardation*,[47] in which Justice Ness noted that a claimant "violates the spirit of the act"[48] when he disregards the subrogation rights of his employer's insurance carrier.[49]

The case arose when Lelia Hudson was struck by an automobile in her employer's parking lot. Although she notified her employer, Townsend Saw Chain Co. (Townsend), of her injury, she failed to provide the required notice within 30 days of the commencement of her lawsuit against the driver. Following a jury verdict for the defendant, Hudson filed a claim for workers' compensation benefits. The Workers' Compensation Commission found that "Hudson's prosecution of the third-party action to a final determination constituted an election of remedies that barred her claim to workers' compensation."[50] The circuit court vacated the Commission's order, but the court of appeals reinstated the original determination that an election of remedies had been made.[51]

The primary issue decided in *Hudson* was whether the notice requirement of section 42-1-560(b) applies to all cases, or only to those in which the workers' compensation claim and the third-party action are pursued simultaneously. The circuit court relied exclusively on section 42-1-550,[52] which permits an employee to prosecute an action against a third person to a final determination before a workers' compensation award is made.[53]

The court of appeals disagreed, noting that the South Carolina Supreme Court had identified the " 'equitable adjustment of the rights of *all* the parties' "[54] as the primary purpose of section 42-1-560.[55] Therefore, the court reasoned, section 42-1-550 must be read with reference to the notice requirement of section 42-1-560.[56]

In *Fisher* the plaintiff attempted to pursue a workers' compensa-

---

46. *See Hudson*, 296 S.C. at 22, 370 S.E.2d at 107-08.
47. 277 S.C. 573, 291 S.E.2d 200 (1982).
48. *Id.* at 576, 291 S.E.2d at 201.
49. *Hudson*, 296 S.C. at 21, 370 S.E.2d at 106.
50. *Id.* at 19, 370 S.E.2d at 105.
51. *See id.* at 19-21, 370 S.E.2d at 106.
52. S.C. CODE ANN. § 42-1-550 (Law. Co-op. 1976).
53. *See Hudson*, 296 S.C. at 19-20, 370 S.E.2d at 105-06.
54. *Id.* at 23, 370 S.E.2d at 107 (quoting Fisher v. South Carolina Dep't of Mental Retardation, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982)).
55. *Id.*
56. *Id.* at 20, 370 S.E.2d at 106.

tion claim after reaching an out-of-court settlement with a third-party tortfeasor. The supreme court held that a claimant has three options: (1) collect from the employer-carrier only, and let the employer seek reimbursement from the third party; (2) sue the tortfeasor only; or (3) proceed against both parties.[57] Based on Hudson's failure to comply with section 42-1-560 notice requirements, the court of appeals deduced that she had elected to sue only the tortfeasor. Dismissing without comment the claimant's observation that election of remedies is not addressed by the South Carolina statute,[58] the court construed the notice requirement to be applicable to *all* third-party actions, "irrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim."[59] Although the court implied that the question of prejudice to the employer and insurance carrier was not relevant to its decision, the language of the opinion reflects the court's concern that the employer's subrogation rights could be forfeited as a result of a unilateral decision by the employee.[60]

Aware of the modern trend of courts to view election of remedies as "foreign to the spirit and purpose of compensation legislation,"[61] the court of appeals viewed the circuit court's decision, which made the rights of the employer and carrier dependent upon the timing of the employee's workers' compensation and third-party claims,[62] as no less "smacking" of medieval legalism.[63] Requiring claimants to affirmatively protect the employer-carrier's subrogation rights by providing notice of the suit merely promotes the goal of equity to all parties. The burden of the requirement is lessened, the court observed, by the "meaningful assistance" the employer-carrier can provide to the employee in prosecuting the suit.[64]

Hudson is significant for three principal reasons. First, it carries *Johnson v. Pennsylvania Millers Mutual Insurance Co.* to its logical

---

57. *Fisher*, 277 S.C. at 575, 291 S.E.2d at 201.

58. The court undoubtedly was influenced by the following observation made by the supreme court in *Fisher*:

> While § 42-1-560 does not specifically state that settlement with a third party without the carrier's consent constitutes an election of remedies, it is clear from a reading of the statute that the legislature did not intend for a claimant to settle his third party case without regard to the employer's rights for subrogation under § 42-1-550 and still maintain a workmen's compensation claim.

Id.

59. *Hudson*, 296 S.C. at 20, 370 S.E.2d at 106.

60. *See id.* at 23, 370 S.E.2d at 107-08.

61. 2A A. LARSON, *supra* note 19, § 73.30.

62. *Hudson*, 296 S.C. at 23, 370 S.E.2d at 107-08.

63. *See* 2A A. LARSON, *supra* note 19, § 73.30.

64. *Hudson*, 296 S.C. at 22, 370 S.E.2d at 107.

conclusion: workers' compensation claims are barred if the notice requirement is not met. Second, the decision indicates a belief by the court that policy considerations encouraging liberal application of workers' compensation laws must be balanced by the employer-carrier's right to reduce costs through participation in third-party actions. The presumption that employer-carriers' interests are equal to employees' interests demonstrates the unwillingness of South Carolina courts " 'to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain reimbursement from the third party.' "[65] The decision, though, is not as draconian as it may initially appear. Unlike antiquated election doctrines that required "the injured employee . . . to hazard his substantive rights on an election between claiming compensation and suing a third-party tortfeasor,"[66] *Hudson* allows the claimant to preserve both remedies by meeting the relatively simple notice requirements of section 42-1-560.

Finally, the decision shifts the rights and responsibilities of the participants in the workers' compensation system. Employers and their insurance carriers are protected from liability in cases in which their subrogation rights have been effectively foreclosed by actions to which they were not a party. The burden of this additional employer protection, however, is not shifted to employees. Instead, it will be borne largely by unsuccessful plaintiffs' attorneys who, having been put on notice by the court, may find themselves subject to malpractice actions for failure to preserve their clients' workers' compensation claims.

Kenneth J. Mitteldorf

---

65. *Fisher*, 277 S.C. at 575-76, 291 S.E.2d at 201 (quoting Stroy v. Millwood Drug Store, 235 S.C. 52, 59, 109 S.E.2d 706, 709 (1959)).

66. 2A A. LARSON, *supra* note 19, § 73.00.